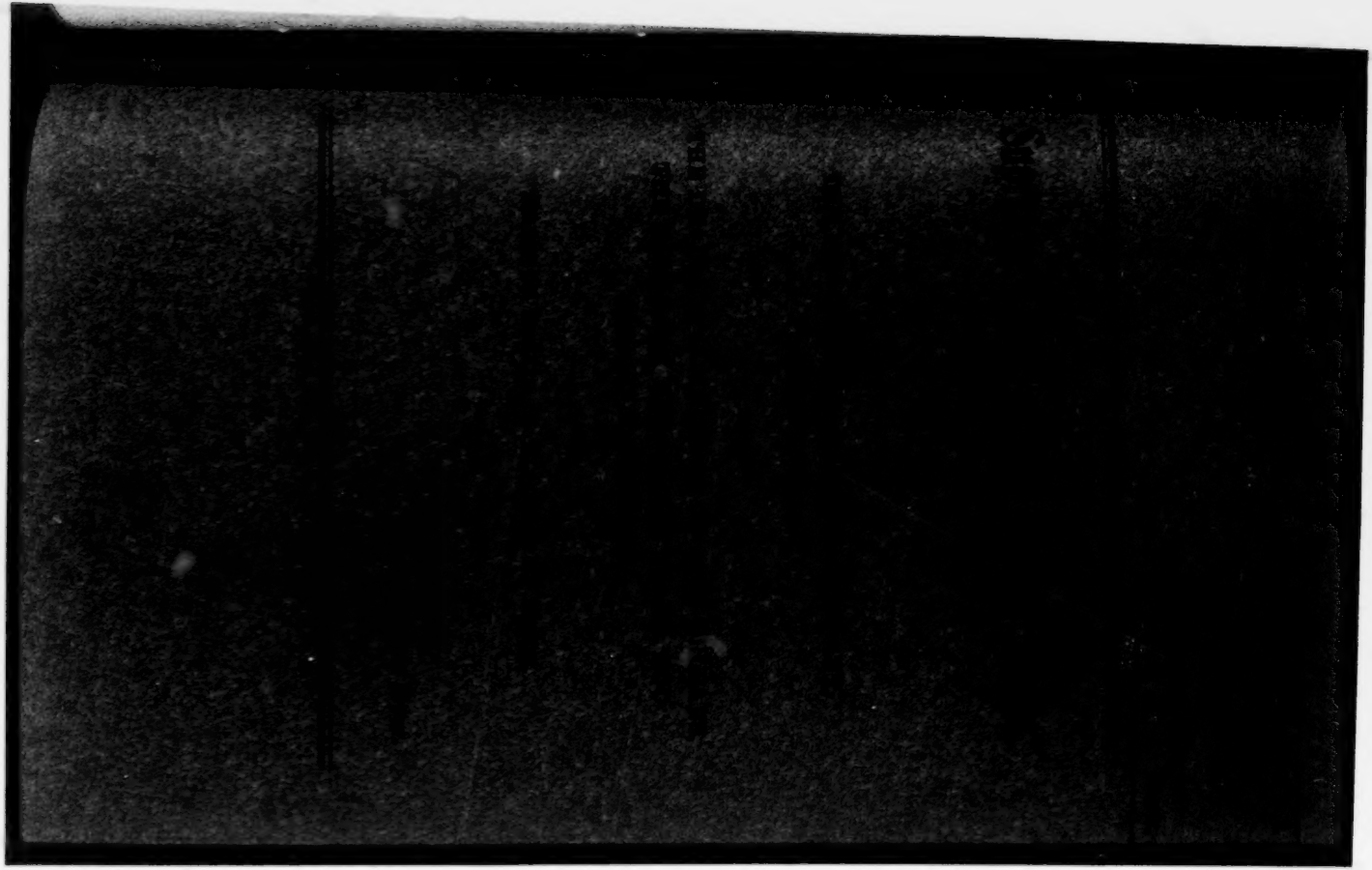

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 172.

THE NEW ORLEANS GASLIGHT COMPANY,
PLAINTIFF IN ERROR,

versus

THE DRAINAGE COMMISSION OF NEW ORLEANS, THE SEWERAGE AND WATER BOARD, SUCCESSOR, SUBSTITUTED.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. HISTORY OF ORGANIZATION, FRANCHISES, ETC.

The New Orleans Gaslight Company, plaintiff in error, is, in all respects, the same and identical corporation, which was "plaintiff in error," in the case reported as "*New Orleans Gas Company vs. Louisiana Light Company*, in *115 U. S. 650.*

In that decision, pp. 651, *et seq.*, the history of its organization and the privileges and franchises with which it was endowed are minutely set forth.

It was originally chartered under the name and title of the *New Orleans Gaslight and Banking Company*, by Act of the

Legislature of Louisiana, passed April 1st, 1835. Section 2 of said act creates the corporation and Sections 36 and 37 define its franchises as a "Gas Company," in the following terms, to wit:

Section 36. "*Be it further enacted, etc.*, That the New Orleans Gaslight and Banking Company, their successors and assigns shall have and be entitled to the sole and exclusive privilege of vending gaslights in the city of New Orleans and its faubourgs, and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same."

Section 37. "*Be it further enacted, etc.*, That in order to enable the said company to carry the foregoing section into effect they shall be authorized to lay pipes or conduits, at the expense of the company in any of the streets of said city and its faubourgs and the streets of the city of Lafayette, where the same may be required, in such manner as may produce the least possible inconvenience to the city or its inhabitants, etc."

By *Act No. 100* of the Acts of the Legislature of 1845, approved March 10th, 1845, the company was relieved of its obligations and franchises as a banking company, but all its franchises "to make and vend gas" were retained to be exercised under the name and title of "The New Orleans Gaslight Company."

Section 5 of said *Act of 1845*, page 60, provides for certain conditions under which the original charter was thus amended, as follows:

Sec. 5. "*Be it further enacted, etc.*, That the said New Orleans Gaslight and Banking Company shall execute a full release and discharge of all claims they may have against the Charity Hospital, and that during the continuance of the charter of the said New Orleans Gaslight Company, *they shall furnish the said Charity Hospital all the gas and fixtures necessary for lighting the same free of charge.*"

The corporate privileges and franchises thus conferred were to expire on April 1st, 1875.

By an *Act* of the Legislature, passed in 1860, this charter, in all its parts, was extended for twenty years. This *Act* was declared unconstitutional by the Supreme Court of the State in "Crescent City Gaslight Co. vs. N. O. Gaslight Co., 27 An. 138, and may drop out of consideration.

For convenience, the further developments in the history of

the plaintiff company, showing its charter and franchises as they now exist are respectfully submitted in the language of this Court in the case above referred to, *New Orleans Gaslight Co. vs. Louisiana Light Co., 115 U. S. Reports, pp. 652-653*, as follows:

"By an act approved April 20th, 1870, another company, under the name of the Crescent City Gaslight Company was incorporated. The charter provided that that company, its successors and assigns, should for *fifty years* from the expiration of the charter of the New Orleans Gaslight Company, have the sole and exclusive privilege of making and supplying gaslights in the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment in 1873, it was given authority to issue bonds to an amount not exceeding $1,000,000.00, secured by mortgage of its works and property, and it was declared that the charter of the New Orleans Gaslight Company should expire on April 1st, 1875, from which latter date and for the term fixed in the act of 1870, the franchise and privileges granted to the Crescent City Gaslight Company were confirmed.

"By a judgment rendered February 1st, 1875, in a suit brought by the Crescent City Gaslight Company against the New Orleans Gaslight Company, and which involved their respective rights to manufacture and sell gas in New Orleans, the Supreme Court of the State held that the former company 'has the sole and exclusive privilege to make and sell illuminating gas in the city of New Orleans for fifty years from 1st April, 1875;' also that the act of March 1st, 1860, extending the charter of the New Orleans Gaslight Company from April 1st, 1875, until April 1st, 1895, "is unconstitutional and void,' as having a title that did not declare the object of the act. The latter company was also enjoined from conducting business after April 1st, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. *Crescent City Gaslight Company, vs. New Orleans Gaslight Company, 27 An. 138.*"

Thus, on or up to April 1st, 1875, there existed two companies—the original corporation created in 1835, with franchises expiring at that date, existing under the name and title "The New Orleans Gas Company"— and the "Crescent City Gaslight Company," created by acts of April 20th, 1870, and July 10th, 1873, the latter's franchises, "to make and sell gas," exclusive

as the former's, coming into existence on April 1st, 1875, as the former's expire, to be enjoyed for fifty years, viz: to April 1st, 1925.

Pending the case of Crescent City Gaslight Company vs. The New Orleans Gaslight Company, or immediately upon the rendition of the decision maintaining the charter of the former and declaring unconstitutional the extension of the charter of The New Orleans Gas Company, the two companies "consolidated on March 29th, 1875, in accordance with the provisions of the act of the Legislature of December 12, 1874, under the name of the New Orleans Gaslight Company. The validity and legality of this consolidation,—and the right to the "*exclusive franchise*" to manufacture and sell gas were the issues in the case from which above extract is quoted, 115 U. S., page 650. It was contended that the franchise "*was abrogated to the extent that it was made exclusive by that article of the Constitution of Louisiana of 1879 which, while preserving rights, claims and privileges then existing, provided that 'the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished.'' 115 U. S. 560.*

On both points the decision was in favor of the New Orleans Gaslight Company, confirming the validity of its corporate existence and its title to the exclusive franchises conferred by the Legislature in the various *acts* to be enjoyed until April 1st, 1925. These right have never been questioned since and are not questioned in this case.

[The decisions in the two cases,—115 U. S.,—and 27 An. 138—and all the *Acts* of the Legislature referred to. except the original *Acts* of 1835 and 1845, pertinent sections of which are herein above given *in extenso*,—having been offered in evidence in pamphlet form are contained in the printed Record, pages 34 to 82, inclusive.]

In the case of *Charity Hospital vs. New Orleans Gaslight Company*, 40 An. 382, the Supreme Court of Louisiana decided on issue made on the question, that the obligation to furnish gas free of charge to that institution, imposed by Section 5 of the

Act of 1845, was carried into the consolidated charter. At page 90, printed Record, is the statement of the President of the gas company showing the commercial *value* of gas consumed, "at regular rates," for the years from 1894 to 1900, inclusive,—seven years,—to amount to $38,481.75,—subject to a discount of 35 per cent., if paid within a time limit." The obligation to furnish gas to the Hospital runs with the charter to April 1st, 1925.

The Charity Hospital is a State institution—entirely maintained by the State, and the value of gas consumed, above given, enables us to form an estimate of the consideration, paid and to be paid to the State, for the franchises conferred on the company —plaintiff.

II. STATEMENT OF FACTS AND PLEADINGS.

The New Orleans Gaslight Company, plaintiff in error, exercised the rights and privileges thus conferred since the date of the original charter and since the reorganization, March 29th, 1875—without any question or interference.

About two hundred and twelve miles of "mains" have been laid throughout the city—(Testimony of Duncan Jones, printed Record, p. 23)—and, in the nature of things, the works are constantly expanding.

In the year 1893 the city of New Orleans, by various ordinances, began to agitate the question of providing for a general system of drainage:—various ordinances were passed (see printed Record, 83 to 89)—which culminated in the passage of Act No. 114 of the Legislature of Louisiana, of the Acts of 1896, practically adopting the plans proposed by the city, organizing a board called the "Drainage Commission," defining its powers, etc., etc.)

Section 8 of said Act is the only one which concerns us in this case and reads as follows:

SEC. 8. "*Be it further enacted, etc.*, That said commission

shall have power to employ such engineers and counsel as it may find necessary in the progress and execution of the work; *' and shall have the power to expropriate according to existing laws, by legal proceedings in its name and the right in all streets, and in and over all lands of the State and city in New Orleans or in the Parish of St. Bernard is hereby granted to said commission for any of its works.'* "

In due course of time the drainage work progressing came in conflict at various localities with the pipes and mains of the plaintiff company and the removal was demanded.

Thus an issue was created: the Gas Company contended, primarily, that its mains could not, under any conditions, be disturbed, but, in the alternative—quoting from the petition, printed Record, page 3.

Printed Record, p. 3—"That if it were true, as matter of law, that the objects for which the Drainage Commission was created, and the works which it had to construct, involved the exercise of an act of a high public nature, which would authorize the taking or damaging of private property, that such taking or injuring could not be consummated without compensation duly and previously made. And this contention led to an understanding between the parties, that in view of the difficult and hazardous nature of the work and the technical knowledge and skill requisite to its proper execution, plaintiffs herein, the New Orleans Gaslight Company, would do the work claimed to be necessary, change its mains, pipes and conduits in conformity with the plans made by the engineers of the Drainage Commission, keep a full and accurate account of the actual cost of such work, and that it, the Drainage Commission, would pay such costs."

This agreement was carried into effect; mains were taken up and relaid and various items of work done, from August 13th, 1898, to July 31st, 1899, when a statement of bills approved was rendered amounting to $2,481.38, which amount was duly paid.

Then a change came over the spirit of the commission and its legal advisor.

The agreement and payment had been under advice of counsel,—now a new position was taken: The commission claimed that it had acted under error of law as to its rights and powers and the rights of the State in the premises, and insisted that

where the mains and pipes of the plaintiff company were in the way of the drainage, they must be taken up and relaid at the expense of the Gas Company, the expense and injury inflicted or resulting to be suffered, without recourse, as *damnum absque injuria.*

Whereupon, again, for obvious reasons, in part set forth in the petition, a second agreement was entered into that the plaintiff company would continue to do the work as theretofore, keep strict account " and that the question of liability be submitted for adjudication to the courts of justice." When, under this arrangement a sum of four thousand and sixty-five 58-100 dollars had accrued, this suit was instituted.

These main facts, as well as the nature of the plaintiff-corporation, its rights, objects and franchises are set forth at length in the petition.

The petition concludes with the averment of liability for two specified " reasons " the one which concerns us in this Court being stated as follows:

"Second. If such work was necessary in the interest of a public work, still, acts done and rights claimed under pretended authority of said Act No. 114 of the acts of session of 1896, by the defendant, impair the obligation of the contract between the plaintiff and the State of Louisiana, in violation of Article I, Section 10 of the Constitution of the United States, and of Article 166 of the Constitution of this State; or said acts are and constitute a taking or damaging of private property for a public purpose, which carries with it and imposes the legal obligation to make 'just and adequate compensation for the injury inflicted by such taking or damaging.'

"And petitioner shows that Section 8 of said Act No. 114, which purports to give to such Drainage Commission the right to expropriate property—vests all the power and obligations of the State itself, in this regard, in said Drainage Commission, and imposes on said commission liability for property expropriated or damaged; and in so far as said Section 8 confers a 'right in all streets' in the city of New Orleans—such 'right' must be held to have been conferred subject to prior grants, and to the extent that this may be denied and absolute right claimed—said Section 8 especially is, as to petitioner, null, void and unconstitutional under said Article I, Section 10, Constitution of the United States, and Article 166 of the State Constitution."

Article 166 of the Constitution of Louisiana embodies the prohibition against the impairment of obligations and divesting vested rights.

Article 167 provides: "Private property shall not be taken or damaged for public purpose without just and adequate compensation being first paid."

The *Answer*, after setting up the "general issue"—practically admits the facts set forth in the petition and pleads the "powers" granted to the Drainage Commission, as recited above from Sec. 8 of the act: avers, that "*with reference to the accomplishment of the construction of said drainage system* (it) was vested *with the police power of the State*," the gist of defense urged being embodied in the concluding lines (Record, page 21), "that it had the right to require in the construction of this public work the plaintiff to so conform its mains and conduits as not to obstruct or impair the efficiency of said system."

The question of fact that the drainage works might have been constructed so as not to touch the mains of the plaintiff company, dropped out of the case, and we accept as the elemental premise for our legal structure the fact stated by the engineer of the Drainage Commission that the changes and removal of gas mains were necessary to carry out the plans and specifications for drainage.

In other words, it is conceded that a condition existed which would have warranted the State of Louisiana or a duly authorized sub-agency, in the exercise of "Eminent Domain," to enforce a removal of the mains and pipes of the Gas Company from one location in the street to another, on payment of just and adequate compensation.

The Court of original jurisdiction rejected plaintiff's demand. P. R. 92. On appeal, the Supreme Court of the State reversed this judgment. *Opinion*. P. R. 96-99. On rehearing, *this* judgment was rescinded and final decree rendered affirming the original judgment rejecting plaintiff's claim. Mr. Justice

Breaux, the organ of the Court, on the first decision, dissenting. *Opinion.* P. R. 105-115.

The "Fourteenth Amendment" and Article 167 of the Louisiana Constitution, above cited, are not specifically referred to in the petition, but the issue arising under them is distinctly made in the plea that, if the acts complained of—if not literally an impairment of the obligation of the contract, "are and constitute a taking or damaging of private property for a public purpose, which carries with it and imposes the legal obligation to make just and adequate compensation for the injury inflicted by such taking or damaging."

The "assignment of errors," elaborating the points more specifically is, for convenience, submitted *in extenso:*

ASSIGNMENT OF ERRORS.

"The above plaintiff and plaintiff in error in connection with the petition for writ of error, makes the following assignment of error, which it avers are to be found in the opinion, judgment and decree of this honorable court:

I. "*That* the Supreme Court of the State of Louisiana erred in failing to hold and decide that the pipes and mains for delivery of gas to consumers as duly and legally laid under the 'streets and alleys' of the city of New Orleans, under and in express authority and permission of legislative grant embodied in the act of incorporation were and constituted a fixed and integral part of the necessary work, plans and machinery of the corporation plaintiff and were in their location and fixture vested rights and property under the charter which constituted a contract between it and the State of Louisiana protected from impairment by the provisions of Section 10, Paragraph 1 of the Constitution of the United States."

II. "*That* the court erred in holding that the violent or forced removal of pipes and the necessary and consequent relaying of same at great expense to supply gas to the public which the plaintiff company is bound to furnish on penalty of forfeiture of charter is not a 'taking and damaging of property.'"

III. "*That* the Honorable the Supreme Court of the State erred in holding that the State in the exercise of police power or reserved power of regulation directly or through the agency of a subordinate public corporation could take, damage or interfere with and affect damagingly the property of the plaintiff corporation without violating constitutional principles; or tak-

ing property without due process of law; or denying to plaintiff the equal privilege and protection of the law."

IV. "*That* the Honorable the Supreme Court of the State of Louisiana erred in failing and refusing to hold as claimed and contended for by plaintiff that the right of plaintiff in and to 'its mains and pipes' as laid in the streets, and to the undisturbed use and possession thereof as laid in accordance with the grant from the State was an absolute, indefeasible vested right constituting property of value which could not be appropriated, taken or damaged for a public purpose by the State—even under pretense of regulation or exercise of police power, except after legal expropriation in the exercise of the State's power of 'Eminent Domain'—for compensation previously made."

THIRD—THE ARGUMENT.

Preliminary to the argument let it always be remembered that the amicable arrangement to move the pipes and mains, reserving the question of liability at law to be settled in the courts, must not prejudice the position of plaintiff. The questions involved must, in fairness, be determined as if the issue were made in a legal proceeding anterior to the infliction of damage;—in other words, precisely as if plaintiff were seeking by injunction to prevent the acts contemplated unless compensation were made;—or as if the defendant were proceeding by mandatory injunction to compel the plaintiff to remove the mains and pipes while denying liability for the expense involved or the damage inflicted.

The case acquires some dignity and importance from the fact that while involving no new or unrecognized principles it certainly imposes the task of applying established rules to new and untried conditions:—unless, as is contended on behalf of defendants, that we have here nothing but an ordinary and common question of "regulation" of *the use of* public streets or highways before which all manner of private or special rights must pale their ineffectual pretensions.

It is not disputed that the *charter* of the New Orleans Gaslight Company is a *contract* between it and the State, the obliga-

tions "of which cannot be impaired by subsequent legislation. It is equally admitted that the corporation was chartered as a *quasi* public corporation for the performance of a public service.

If any question were made on these points it would be answered by the decision of this Court in *N. O. Gaslight Co. vs. La. Light and Heat Co., 115 U. S., 650.*

The decision in that case, the main contention in which was that by the Constitution of the State of Louisiana of 1879, the "monopoly feature" or "exclusive franchise" of the Gas Company had been revoked—determined, or rather accepted as indisputable premises, the two propositions, viz:

First. "That the manufacture and distributing of illuminating gas, by means of pipes or conduits placed under legislative authority, in the streets of a town or city, is a business of a public character." Page 658.

Second. "That a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, * * * is a grant of a franchise vested in the State, in consideration of the performance of a public service,—and after performance by the grantee is a contract protected by the Constitution of the United States against State legislation to impair it."

With these fundamental propositions conceded, the concrete specific question in the case is reduced to one inquiry, whether the acts complained of impair the obligations of this contract; or whether they constitute a taking or damaging of private property for public use under conditions imposing the duty to make just and adequate compensation.

Since 1835 "mains and conduits" have been laid and used: at the date of trial about two hundred and twelve miles of such were under the streets of the city as part of the working-plant of the corporation, used without let or hindrance; laid under express authority and *mandate* of the charter subject only to the condition that they shall be laid "*in such manner as may produce the least inconvenience to the city and its inhabitants, and provided, also, that the company shall afterwards repair, with the least possible delay, the streets they have broken.*"

Section 9, Act of April 20th, 1870, P. R., page 36.

Nor is it claimed or pretended that there are any special reservations either in the acts of incorporation or the general statutes of the State subject to which such grants are taken; and so the contestation in its last analysis comes to the hard, cold, unvarished proposition that the State—for the State is the offender—claims that where the right to lay mains and pipes in the streets, under legislative authority, was granted—it was done with the understanding that they might have to be taken up and relaid in indefinite number of times if the State needed for some other purpose the particular locality where they were originally laid. The grant is given to lay these conduits—and they must be laid or the charter is forfeited—for ninety years:—but though given for ninety years the company, after seventy years of peaceable enjoyment, is told to take up these mains and lay them "elsewhere"—in the street—only to be disturbed again next year!

For the right to compel us to move them once implies the right to move them constantly, and the right to move the length of a mile implies the right to move the entire system.

This may not be logic, but it is stubborn fact, and may well suggest the inquiry, whether the State conferred its authority with a reservation destructive of the thing she granted—and whether the grantee would have accepted the grant if it had so understood its limitation.

What does the "franchise" consist of but the right to lay mains? The mere right to manufacture and sell and deliver "gas" is not a franchise.

If gas could be delivered like beer or milk or water, no one would need a "franchise" or permission to make and sell it.

Obviously, then, the right to lay "mains and conduits" is the very life and soul of the body without which there would be no franchise at all;—it is the "franchise" itself. In consideration of the grant of that franchise the State imposes its condi-

tions: the grant must be exercised and mains *must* be laid "wherever required;" that is, where the people demand it.

The grant limits the price at which gas shall be furnished and imposes as a further consideration the obligation to furnish gas to the Charity Hospital free of cost.

Where, then, do the contract-rights of the plaintiff begin and end? Is it not a part of the contract that the mains when lawfully laid are laid in accordance with the grant and must be protected as such?

The Supreme Court of Louisiana maintained in the decision first rendered the right of plaintiff to receive compensation.

It considered the right of the plaintiff in its mains and conduits and their protection, a private property right which could neither be taken or damaged without compensation, under pretense of exercise of the police power and brought the case distinctly under the provisions of Art. 167 of the Louisiana Constitution which provides "that private property shall not be taken or damaged for a public purpose without compensation." P. R., pp. 98, 99.

The rehearing was granted—and the first decree rescinded and annulled on propositions, and a line of reasoning which, with due deference to that august tribunal, must expose to this Honorable Court the fallacy of the entire defense.

The opinion adopts two propositions, urged by counsel for defendant, as basis for its decision, viz:

First. "That the Gas Company had only the right of user in the public streets along with all other citizens, and acquired no right of ownership or 'property' in or to any part of the public streets by virtue of its charter 'provisions.' (2 Dillon Mun. Corp. 3d Ed. 683)."

(A reference to this citation will show that it deals entirely with the surface use of streets as public highways.)

Second. "That it took this right of user, subject to the implied condition that the State or the city might, in the exercise of its police power for the public health or the public safety, cause other structures to be placed in or on such streets which might

temporarily inconvenience the Gas Company in its use, or which might occasion *the removal to another* part of the street of its mains and pipes, and that any damage resulting from such temporary inconvenience or such removal was *damnum absque injuria.*"

The court accepted the correctness of these propositions and reversed its former decree.

Every constitutional safeguard—every principle of justice or obligation to the complainant company is swept away and she is treated little better than a trespasser.

Let us see, now, if such be "the law of the land." Let us see if the "police power" is so almighty and irresponsible, that it may sweep away as mock "divinities," the sacred rights which "hedge in," the security of the enjoyment of life, liberty and property. Blessed be the land where such things cannot be and hallowed the principles woven in the fundamental basis of our government which reject such heresies as injustice and spoliation!

The rights of the plaintiff company are of a surer and more permanent character than a mere license, a "user" at the pleasure of the sovereign.

This Court, in 115 U. S., held them to be of more substantial stuff. Differentiating the rights of the New Orleans Gaslight Company from the principles of *Beer vs. Massachusetts; Fertilizing Company vs. Hyde Park; Stone vs. Mississippi; Butcher's Union vs. Crescent City Live Stock Company;* to which might be added the later case of *Mugler vs. Kansas City,*—this Court, quoting from page 669, said:

"It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others."

"The present case involves no such considerations. We have seen the manufacture of gas and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belong-

ing to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety."

The contention that the "Gas Company" has only the right of user in the public streets *along with all other citizens*, is manifestly fallacious and evasive of the special issue, resulting from the fact that the Gas Company has been granted a right of use in the streets for a special purpose, and not a right of user *in* the street "*along with all other citizens.*" But again, this high tribunal has given its interpretation of the nature of the right granted, and we again let the Court speak in its own language. At page 659,. 115 U. S., it quotes from the opinion in New Orleans vs. Clark, 95 U. S., as follows:

"A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet as they advance the public good the corporation may be properly aided in their construction by the city, and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way."

Here, may it not be asked, if the establishment of a gas company—for such was the issue in the case from which the citation is made, is of such public character that the State, or one of its subordinate agencies may issue its bonds in support of the enterprise, may it not, with equal consideration, grant fixed and permanent privilege to use some of the public property—the streets, for instance,—to carry out the same purpose?

This Court, after citing the passage above quoted, proceeds:

"Legislation of that character is not liable to the objection that it is a mere monopoly preventing citizens from engaging in an ordinary pursuit of business open as of common right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use,

is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Municipal Corporation 3d, Sec. 691; State vs. Cincinnati Gas Company. 18 Ohio State, 262; see, also, Boston vs. Richardson, 13 Allen, 146."

"To the same effect is the decision of the Supreme Court of Louisiana in Crescent City Gaslight Company vs. New Orleans Gaslight Company, 27 La. An. 138, 147, in which it was said: 'the right to operate gas works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts and carry on the business of lighting the streets and the houses of the city of New Orleans without special authority from the sovereign. It is a franchise belonging to the State, and in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so."

Clearly, then, the plaintiff in error has something more than "a right of user in the public streets along with all other citizens:" it has a *special right* lawfully granted by the sovereign, of which it cannot be deprived except through the exercise of the power of eminent domain,—nor seriously damaged by a "taking" for another public purpose without compensation.

The precise issue made in this case has been decided by the Circuit Court of the U. S., Fifth Circuit, Eastern District of Louisiana, Judge Pardee, presiding. The New Orleans Waterworks Co.—a corporation not unknown in the records of this Court—is under administration of a Receiver, appointed by that Court in case entitled "*Moore vs.* N. O. Waterworks Co. The Waterworks Co. had entered into an agreement with Drainage Commission, identical in terms and effect with that made by the Gas Company. The *Receiver* appointed refused to be bound by the agreement, and in the form of an application to the court for an injunction to restrain the Drainage Commission, made the issue. The Court granted the injunction. 114 Fed. Rep., pp. 382-83.

The learned Judge analyses the contentions presented on behalf of the Drainage Commission briefly, but with marked comprehensiveness. He finds that there "is a taking or damaging of private property for a public purpose," in the sense of

the article of the Constitution and quotes the language of this Honorable Court, in *Chicago B. & O. R. R. Co. vs. City of Chicago, 166 U. S. 226*, to the effect that "since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element 'in due process of law,' and that without such compensation the appropriation of private property to public use, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution"

The learned Judge, after citation of this and other authorities, formulates his conclusion as follows:

"In the light of these authorities, and under the facts of this case, I am disposed to hold at this time and for this case, that the police power of the State, so far as vested in the Drainage Commission under the legislation which creates the commission, goes to the extent of, and no further than the right to the joint occupancy of the streets of the city with the Waterworks Company, and the right to remove and replace, provided the same can be replaced, the mains and pipes of the Waterworks Company wherever necessary to secure such joint occupancy and construct works in accordance with the plans for drainage adopted by the city; but that so far as it may be found necessary in prosecuting the drainage work to appropriate, expropriate, take or damage the property of the New Orleans Waterworks Company, including the removal and replacing of waterworks, mains and pipes, it can only lawfully proceed by previously making just and adequate compensation."

The case confidently relied on by the defendant and quoted in the decision of the Supreme Court of Louisiana, of "*National Waterworks Company vs. City of Kansas*, (G. C.) 28 Fed. Rep. 921—" is thus differentiated by the learned Judge from the present case:—In that case (quoting)—"there was no such contract as here and there was a reservation in favor of the city as to the designation of streets or where pipes might be laid." Page 382.

It might be added to this that the learned Judge (Mr. Justice Brewer) placed his decision on the authority of the Slaughterhouse cases, 16 Wall. 36, and Butchers' Union vs. Crescent City, 111 U. S. 746, which cases were distinctly held by this Court in 115 U. S., above cited, to rest upon principles not in conflict with the grant of an *exclusive privilege* to a gas company.

It is difficult to subdivide the argument under the two-fold plea that the plaintiff is protected by both the provisions prohibiting impairment of obligations, *Art. 1, Sec. 10, Paragraph* I, and by the principle of the *Fourteenth Amendment* embodied in the Art. 167 of the State Constitution, against the taking or damaging of private property for public use without compensation.

Without extending the discussion too much into collateral questions, it may be assumed that the latter provisions are an extension of the rights guaranteed to private property as against the public beyond those secured by the prohibition against the impairment of contract obligations.

We invoke the contract as the source and evidence of our title to lay mains in—or rather, *under* the streets, and that when so laid, and as laid, they constitute the company's private property, invested with all the elements of ownership and subject only to the general burdens imposed on all property in the State. And being private property it cannot be taken or damaged without violating either the contract rights of the company or the general principles of the Fourteenth Amendment, under which a taking or damaging of private property for a public purpose without compensation is held to be a taking without "due process of law."

To inform the court to what extent the textual provisions of the *Civil Code* of Louisiana recognize the rights of private ownership, we submit the following articles, cited by Boarman, J., in Hollingsworth vs. Parish of Tensas, 17 Fed. Rep. 109, in which he held, "that private property cannot be taken, appropriated or damaged for public use through the exercise of the single principles of Eminent Domain, which, in all cases, carries with it the right of just indemnity."

He cited Art. 2604. "The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses, under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, whenever it becomes necessary for the general use."

Art. 2605. "If the owner of a thing necessary for the general use refuses to yield it, or demands an exorbitant price, he may be divested of the property by authority of law."

Art. 2606. "In all cases a fair price should be given to the owner for the thing of which he is dispossessed."

Art. 489. "No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law."

Art. 2294. "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it."

Art. 156, Const. La., 1879. "Private property shall not BE TAKEN OR DAMAGED for public purposes without just and adequate compensation being first paid." (Now *Art. 167, Const. 1898.*)

THE LAW AND JURISPRUDENCE APPLICABLE TO THE CASE.

The issue, besides the question of *impairment of contract-obligations*, turns on whether we here have a "taking or damaging" for a "public purpose," or a mere matter of "general regulation."

Let the authorities speak for themselves:

The case of *Chicago vs. Taylor*, *125 U. S. 161*, furnishes an initial analysis to the discussion because it seems to be the first case in which an enlarged provision of the Constitution of Illinois was applied,—viz: "that private property could not be taken *or damaged* without compensation."

The provisions in various State Constitutions embodying compensation for *damage* are the product of recent developments,—Louisiana did not have it in her Constitution until 1879—retained in that of 1898.

Illinois adopted it in 1870 (quoted in Taylor case) enlarging the text of prior Constitutions which gave compensation only for property "taken or applied to public use."

I respectfully submit in this connection that, while as matter of jurisdiction or final decision, it may be contended that this Court will follow the State Court decisions on construction of the

State Constitution, the articles in a State Constitution considered in *Chicago vs. Taylor*, and part of the organic law of Louisiana, merely gives expression to the principle embodied in the Fourteenth Amendment and the conditions which would authorize relief in one case would secure it in the other. Therefore, an *authority* on the scope of such provision in the State Constitution is an authority to this Court for the exercise of its judicial power to enforce the guarantees of the Fourteenth Amendment.

Under the Constitution of Illinois, in force prior to 1870, there could be no recovery for "consequential damages resulting from changes in streets," etc.—but in the case cited the U. S. Circuit Court awarded damages under the said enlarged provision of the Constitution and the judgment was affirmed by this Court.

In that case, as in this, the defense was "regulation" of public highway under the police power—*damnum absque injuria.*

The questions are elaborately discussed and clear conclusion reached that where one, from the prosecution of a public work suffers a "special injury" in excess of the injury done to others"—(page 165),—he has a cause of action. As indicative of the scope of the case, the following is submitted, from p. 166:

"The new rule of civil conduct, introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

The final result is expressed in the syllabus:

"Under the provision in the Constitution of the State of Illinois, adopted in 1870, that 'private property shall not be taken or damaged for public use without just compensation,' a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage may be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value."

As embraced in certain propositions laid down by the Supreme Court of Oregon, in *Little Nestucca Road Co. vs. Tulmock County, 31 Oregon, 1,* attention is called to the fact that we have in this case a "public purpose or utility" coming in conflict with a previously established concern of equal public purpose and character. The authorities are to the effect, that one cannot be destroyed to give way to another without compensation, and *statutes* authorizing such taking are unconstitutional. *Southwestern R. R. Co. vs. Southern, etc., Tel. Co., 46 Ga. 43;* Connecticut River R. R. Co. vs. County Commissioners, 127 Mass. 50; in *Nestucca Road,* etc., cited above, 31 Oregon, 1, following propositions asserted and approved:

"The right to take lands already appropriated to one public use for the purpose of appropriating them to another exists only where there is a statute clearly conferring such authority. A statute authorizing the laying out of a public highway does not justify taking therefor lands previously devoted to some other public use."

"The taking of lands already devoted to one public use and appropriating it to another may be authorized by the Legislature, but the authority must be conferred by express terms or arise from necessary implication."

"*Property already devoted to one public use cannot be taken for another without first making compensation to the persons interested in the previous public use. Hence, lands used as a public toll road, cannot be taken for public highways free from such tolls, unless the owners of the toll road are compensated for moneys expended by them in acquiring the right of way and in making improvements.*"

In *County of San Mateo vs. So. Pacific. Co., 13 Fed. Rep. 733,* it is held that:

"Under the reserved power to amend, alter or repeal the laws under which private corporations are formed, 'the State cannot exercise a control over the property of a corporation, except such as may be exercised through control of its franchises, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.'"

In *Rutland Electric Light Co vs. Marble City Co.,* 65 Vermont, 377, 36 American State Reports, page 868, the Supreme Court of that State decided:

"When a city conferred on an electric light company the right to erect its polls on certain streets, and the company, relying upon the license thus given, expends money in establishing its plant and appliances, the city cannot, by a subsequent ordinance, infringe on the rights thus vested, or bestow on another company the authority to infringe them."

The court cites Hudson Tel. Co. vs. Jersey City, 49 N. J. L. 303, where it was held "that where the city, under statutory authority had designated certain public streets in which the company might place its telegraph poles, and the company had expended money in placing its polls upon such streets, the city could not, by subsequent ordinances, revoke such designation; *that the company had an irrevocable vested right to use the streets for the designated purpose.*"

In *Fidelity Trust Co. vs. Mobile Ry. Co.*, Fed. Reporter, 687, it was held that a franchise to operate a street railway could not be interfered with; that the "dispossession" of any portion thereof was a taking of the franchise, *pro tanto*, etc.

In *Clarksburg Electric Light Co. vs. Clarksburg*, 50 Lawyer's Rep., annotated,—page 142, it was held "that a grant of use of streets for conveyance of electric light is a contract protected by constitutional provisions from impairment."

In the *note* to that case—page 142—closing at 151,—numerous decisions are reviewed, the substance of which is thus summarized:

"The conclusion from all the authorities seems clear, to the effect that a franchise or privilege to use streets for any of the various *quasi* public purposes, above considered, will constitute an irrevocable contract, unless there is, in some form, a clear reservation to cancel or revoke it."

And in point,—*Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S. 683;* Chicago Gas Co. vs. Lake, 130 Ill. 42; Indianapolis vs. Consumer Gas Co., 140 Ind. 114.

In matter of "*Sixth Avenue Railway*," 72 N. Y. 330, it was held that the right of a street railway company to the use of a street for the purposes of its business is a property right and can only be taken under condemnation for public use and compensation made and embodying the idea of a partial damage only by allow-

ing another railroad to run upon the street or another company to run its cars on the same track, the Court said:

"The State in the exercise of the right of Eminent Domain, or a corporation to whom it has delegated the right, is not bound to take the entire estate and strictly should take only such an interest as is necessary to be acquired to accomplish the public purposes in view."

Judge *Dillon*, "Municipal Corporations," 3d Ed., Vol. II, *Section 588*, page 582, lays down the following propositions as embodying the established jurisprudence, to-wit:

"1 That the Legislature may, in the exercise of the right of Eminent Domain, deprive corporations of their property and franchises upon making compensation; but this can be done only under power to that end specially or expressly granted.

"2. If a corporation holds land or property as a private proprietor, and not for public uses, this may be taken under the power of Eminent Domain the same as if owned by an individual.

"3. But lands held by corporation upon a special trust for public use, and thus used, cannot be compulsorily appropriated to another public use without special authority from the Legislature.

"4. And hence a corporation cannot, under a general power, to condemn property for public use, take from another corporation having like power, property held by it, under legislative authority, for public purposes, although it may, it seems, under such general power, acquire an easement in *invitum* in such property when this can be done without doing injury to the public, or essentially interfering with the uses for which it was acquired and is held by the corporation which owns it."

The Supreme Court of this State,—Louisiana, held in *Irvin vs. Tel. Co., 37 Ann. 63*, that where some one person, or some particular persons suffer a special damage from the enforcement of a police regulation,—"not common to all other persons," they would be entitled to compensation for such *special injury*.

We find in *Glover us. Powell*, 10 N. J. Eq. 211, a case identical in principle with this case.

In remote "colonial days"—1760,— under legislative permission certain proprietors of meadow land subject to overflow along a small water course "where the tide ebbed and flowed" constructed a dam, thereby reclaiming the lands;—the parties

in interest were practically constituted a quasi-corporation with power of control to levy assessments, etc., and the dam was so maintained until 1854 when the Legislature, for purposes of public use of the stream, passed an act directing the demolition or removal of the dam.

An injunction was issued and made perpetual and maintained on the grounds, 1st, *that the dam was constructed under conditions constituting a contract protected by the Constitution of the United States.*

2d. *That the Act of 1854 was repugnant to the State Constitution which declares "that private property shall not be taken for public use without just compensation*

I quote from the text:

"Under the provisions of the act of 1760, rights have become vested and valuable property, has been acquired. These powers and this property have been enjoyed under the protection of this act for nearly a century past. The State has participated in the benefits conferred. The property acquired under the act has been taxed for the support of the State and municipal governments. It is in violation of good faith, it impairs the obligation of a contract which has been enjoyed to the mutual benefit of both parties, and it is, therefore, repugnant to the Constitution of the United States."

"The act of 1854 is also repugnant to the Constitution of the State of New Jersey, which declares private property shall not be taken for public use without just compensation. * * *

"The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadow along the creek. They have been acquired under the express sanction of law. The value of the meadow is destroyed by the execution of the law in question, and thus may be said, with propriety, to be taken from the owner. A partial destruction—a diminution of the value, is a taking of private property."

In *Fidelity Trust Co. vs. Mobile Ry. Co.*, 53 Federal Reporter, 687, it was held that a franchise to operate a street railway could not be interfered with; that the "dispossession" of any portion thereof was a taking of the franchise, *pro tanto*, etc.

The rules and principles affirmed and established by these *authorities* will appear more effective as we approach the specific treatment of the

POLICE POWER

AND THE QUESTION OF

WHAT CONSTITUTES A TAKING OR DAMAGING.

The police power, whatever it may be in nature and scope, is subordinate to the Constitution. As said in "*The matter of application of Jacobs,*" 95 N. Y., page 98:

"The limit of the power cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. It furnishes the Supreme Court the guide for the conduct of legislators, judges and private persons and so far as it imposes restraints the police power must be exercised in subordination to it."

Waiving, therefore, a discussion of what the police power is—indeed, confessing utter inability to undertake to define it, yet venture as preliminary to the inquiry as applicable to this case, the proposition that the acts complained of, and causing the damage to the plaintiff are not founded upon an exercise of the police power in its usual and most proper scope. Primarily, as we have seen, the police power is a power of 'regulation' only; enforcing in its simplest and yet widest operation the rule that every man must so use his own as not to injure others.

It would seem work of supererogation, before this tribunal which has so often considered questions of conflict between private rights and the police power of the State to discuss the matter originally.

The line has been distinctly drawn to the effect that the police power cannot be pleaded to justify damaging or taking of private property engaged in a lawful purpose authorized by the State.

The distinction is emphasized in Gas Company case, 115 U. S., where the scope of the great cases already referred to preceding it is defined and limited.

The same reasoning disposes, as inapplicable to the issue in this case, of the case of *Mugler vs. Kansas City*, 123 U. S., page 623.

Stated in its clearest and most concrete form, the complainants in these cases were denied relief or compensation,—held to be *outside* of constitutional protection,—because engaged in business inherently obnoxious, or injurious physically or morally, therefore subject at all times to the police power as the power reserved to the State to protect "the health, the morals and the safety of the community." The conclusion is stated in direct and unambiguous terms:

> "*The destruction in the exercise of the police power of the State, of property used in violation of law, in maintaining a public nuisance is not a taking of property for public use and does not deprive the owner of it without due process of law.*"

Indeed, these cases deal with conditions peculiar to themselves defining distinctly and unmistakably a particular rule or principle applicable to them alone and removed as far as night from day from the conditions under which, as in this case, the question to be determined is the application of constitutional provisions to the "taking" or "damaging" of private property lawfully owned and lawfully used for a purpose expressly authorized by law!

That line of decisions culminating in Mugler vs. Kansas City, really has no application to the case at bar and should be eliminated from consideration.

When an attempt is made to take such property from its owner, for a public purpose, other principles interpose their veto and proclaim that "it shall not be done without just and adequate compensation."

The authorities already cited confirm this proposition.

In addition, reference to authorities in which the conflict between the "police power" and the "Constitution" is expressly involved follow:

Mills, "*On Eminent Domain*, Section 7, deals with the question how property may be taken or affected by the exercise of the police power. There is no general principle laid down; the illustrations confirm the contention which we endeavor to maintain that 'regulation' can only be permitted to operate generally and equally,—except where it suppresses a specific 'nuisance' or deals with a matter *per se* offensive to health, comfort or morality, etc., as illustrated in the Slaughter House Cases, 16 Wall. 36; in Hyde-Park Case, 97 U. S.; Beer Co. vs. Massachusetts, and other similar cases.—

In *Section 44* he lays down a rule deduced from cases cited to the effect that a street railway franchise cannot be destroyed in part by allowing a second line of cars to be run over its tracks without compensation.

ELLIOT, "On Roads and Streets" *Section 20, page 897*, under the heading "*Limitations of Police Power*, "*Vested Rights*,"—says:

"But the police power is not unlimited, and while rights to use streets for electric wires and poles are taken subject to that power, neither the State nor its municipalities can destroy contracts and vested rights by improper regulations and enactments under the guise of the exercise of the police power. *It is generally held that a right granted by a municipality, by ordinance for a valuable consideration, constitutes an irrevocable contract, at least where it is accepted and acted upon by the grantee, and money is expended upon the faith thereof.* In such cases the vested right and the obligation of the contract cannot be materially impaired by attempting to withdraw the consent of the municipality, or imposing other conditions not contemplated by the contract or law and not properly police regulations."

And see *Cooley*, "On Constitutional Limitations," 3d Ed., page 544.

In Chapter XVI, 3d Ed., page 572, *et seq.*, Judge Cooley defines elaborately and minutely the police power, especially in

regard to how it may affect the use and enjoyment of property. He shows distinctly, both upon his own authority and by reference to decisions, that the police power, properly so-called, is simply a power of "regulation,"—quoting extensively from the leading case of *Thorpe vs. Rutland R. R. Co., 27 Vt. 149,* for the purpose of defining what powers the State reserves and exercises over the use and enjoyment of all property in the interest of the protection "of the lives and limbs, health, comfort and quiet of all persons and the protection of all property within the State." His definitions and illustrations of what can be done under the police power,—as a power of regulation, nowhere touch the boundary of the domain within which this case lies. The construction of a system of drainage is not a work of "regulation:" it is the prosecution of a public work, for the public good, and therefore private property of any kind whatsoever may be taken or damaged—but such taking or damaging, inflicting a particular injury on the owners, falls under the protection of Art. 267 of the Constitution of the State—and compensation must be made. We think the authorities will confirm this pretension.

At page 576 he defines *the limit* of the exercise of the police power and shows how far it can go in its interference with rights of use and ownership of property. He says:

"The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with the nature of the provisions of the charter (meaning a charter granted some corporation, such as that under which the plaintiff's rights are asserted in this case),—and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be 'police regulations in fact, and not amendments to the charter in curtailment of the corporate franchise.'"

The *author* deduces his conclusions from the decisions of courts of the highest authority, distinctly to the effect that even rights or works over public highways, when money has been expended and property invested, could not be taken in part or in

whole or damaged except under the exercise of the power of eminent domain and for compensation.

A citation from *Benson vs. Mayer, 10 Barb. 345*, in note at page 576, is particularly in point; also the reference to *Miller vs. N. Y. R. R. Co., 21 Barb. 513*, where it was held that, notwithstanding a reservation of a right to amend or repeal a charter or franchise, a railroad company which has constructed its tracks, appurtenances, etc., could not be compelled to allow a proposed new street or highway to be taken across their track and to be made to construct at their own expense the necessary embankments, excavations and other work to be done for that purpose; thus "not only appropriating a part of their property to another public use, but compelling them to fit it for such use." Throughout the chapter the distinction between regulation, and an attempt to affect vested rights or damage property is strictly maintained and the different line of authorities shown to determine the rights and obligations in the two different directions. The author quotes at length the opinion of *Chief Justice Redfield*, in the case above referred to, from the *27th Vermont*, as showing distinctly what is meant by, and the extent of, the police power for *purposes of "regulation,"* contrasting the exercise of that power with that under which some particular prior right or grant is to be impaired or affected.

Alfred Russel—"The Police Power," page 25, evolves the following definition of the police power:

"It in general covers the conduct of individuals and the use of property and includes the regulation of these subjects of the State," and at page 86 he says:

"Where property is taken in that way for public health or safety, in general it cannot be taken without compensation and there is no distinction in this regard between the power of Eminent Domain and the police power. The police power restricts the use and enjoyment of property; the power of Eminent Domain promotes the public welfare by taking property from the owners and applying it to some public use. Prohibitory liquor laws have been universally upheld and sustained under the police power, in several States,—but, as already ob-

served, there cannot be under this power the appropriation of property without compensation, for public health or safety."

Matter of Cheseborough, 78 N. Y. 332.

Cavanagh vs. Boston, 139 Mass. 426.

From Lewis, "On Eminent Domain:"

Section 35. "The property in connection with which the franchise is made available and the franchise itself are, of course, subject to the power of Eminent Domain like all other property."

"When a part of the property or the whole property is taken for public use, there is no doubt as to the nature of the act or the right to compensation."

Section 56. "When the property is only *damaged*, the damage must be the result of a violation of some one or more of the rights which constitute property—'the unrestricted rights of use, enjoyment and disposal.'"

"In other words, the damage must be actionable damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority."

Freund, "On Police Power,"—a recent work, *Section 513,* defining how property may be affected by the police power, says:

"The normal form of impairment of property rights under the police power is restraint or regulation which leaves property physically intact and merely compels owner to exercise his right over it in a certain manner." * * *

"Restrictive "regulation" is regularly imposed without compensation."

In *Section 515* "regulation" is distinguished from "taking."

Section 555, page 582 * * * "the provisions of the Constitution against the impairment of contract obligations restrict or may restrict the exercise of the police power."

Section 577, page 601, citing 3 Wallace, 51, he says:

"An exclusive franchise granting special rights in public property (laying of pipes, maintenance of a bridge) may be made the subject of a contract and of an irrevocable grant and is protected against subsequent competing grants by the Federal Constitution."

In *Detroit vs. Detroit Citizens' St. R. W. Co., 184 U. S. 868,* this Court said:

"The issue being an attempt on the part of the city of Detroit to reduce the rate of fare, fixed in the original contract, under pretense of the exercise of the reserved 'right to prescribe from time to time the rules and regulations for the running and operation of the road.'"

"That such contract, having once been made, the power of the City over the subject so far as altering the rates of fare or other matters properly involved in and being part of the contract, is suspended for the period of the contract."

In the *Railroad Tax Cases*, 13 Fed. Rep. 755, the "reserved powers of the State over franchises and property of corporations," *i. e.*, public corporations—is elaborately discussed. A distinction is drawn between the right to repeal (if the right is reserved) the *incorporation*—and right over the property of the corporation leading to the conclusion, that:

"The property of the corporation acquired in the exercise of its faculties, is held independently of such reserved power and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

Lewis, "On Eminent Domain," *Section 153*, cites *McCauley vs. Waller, 12 Cal. 500*, to the effect that "*a leasehold in public property, derived from the State cannot be recalled or destroyed without compensation.*"

"*The Binghamton Bridge*" *case, 3 Wall. 51*,—is strongly in point. An enactment creating a corporation with privilege to erect a toll-bridge, and providing that no person shall erect any bridge within two miles on either side—was held a contract protected by the principle of the Dartmouth College case. The prohibition was held to extend to the State. To the same effect is *Bridge Proprietors vs. The Hoboken Co., 1 Wall. 116.*

In *Section 602*, summary of principles regarding how property may be affected by the police power, the author lays down, among his conclusions the following:

No. 1. "The purposes for which the police power may be exercised do not justify the taking of *lawful* property without compensation." * * * * * *

No. 7. "A lawful trust cannot be impaired unless it is organized under a charter which is subject to a reserved power of alteration or repeal."

The Supreme Court of Louisiana, though it denies relief in this case, is not a stranger to this principle; the difference is only in the application. We find them recognized in *Irvine vs. Tele-*

phone Co., 37 An. 63; in *Shreveport Railway Co. vs. St. Louis R. R. Co., 51 An.*, page 814, and in *Railroad Co. vs. Levee Board, 49 An. 570*, where it is said in terms:—"*the right to compensate for property taken for public use, is not to be denied on the ground that the expropriation is the exercise of the police power.*"

Finally, under this head, and as authority on the contention that we have a case of direct impairment of contract obligations the case of *Western Union Tel. Co. vs. Wyatt, 98 Fed. Rep. 335*, is cited. It is there laid down in comprehensive terms that "the power of a State to control public service corporations" * * "is subject to the constitutional limitations designed to protect property against oppressive action by the State amounting to a deprivation of such owners of their property without compensation or without due *process of law.*"

IS THE ENFORCED REMOVAL AND RELAYING OF THE MAINS OF THE PLAINTIFF COMPANY A "TAKING" OR "DAMAGING" OF ITS PRIVATE PROPERTY?

It involves, clearly, an impairment of the contract: it is equally a taking in the sense of the justice of the law as embodied in Art. 167 of the State Constitution and the Fourteenth Amendment.

The principles vitalized in these enactments merely express what the common law of England secured to the people centuries ago. We have the emphatic testimony of Blackstone to this effect.

Blackstone's Commentaries, Vol. 1, page 139.

"So great moreover is the regard of the law for private property that it will not authorize the least violation of it: no, not even for the general good of the whole community."

"* * * When property is taken it is not done by '*stripping the subject of it in an arbitrary manner but by giving him a full indemnification—an equivalent for the injury thereby sustained.*'"

The equity to compensation even for consequential damages is recognized in some States by express legislation. It is so in New York and Massachusetts. *Freund*, "On Police Power," page 545.

Elliot, "On Roads and Streets" *Sections 202 and 203*, 2d Ed., announces unequivocally the conclusion that "*any subjection of land to an assessment or any burden incompatible with the dominion of the owner or the serious interference with the use and enjoyment of property will be deemed a 'taking' within the meaning of the organic law.*"

Again, *Freund, Section 507*, page 543:—"On principle there can be no difference between property taken for public use and injury done to private property in the course of a public undertaking."

In *Section 508* the conclusion is reached that the "*constitutional principle which forbids taking must always forbid injury without compensation.*"

Eaton vs. Boston R. R. Co., 51 N. H., page *504*, and the great case of *Tumpelley vs. Greenbay Co., 13 Wallace 166*, are cited: the latter to the effect that "it would be a curious construction of principles of justice and law to hold that property could be affected by the infliction of irreparable and permanent injury to an extent that in effect subject it to total destruction without making compensation because in the narrow sense of the word it is not a taking for public use."

On this case we greatly found our faith. It defines what constitutes "taking or damaging" and approves and consecrates the principle that private property can neither be taken for a public purpose nor consequentially or incidentally damaged in the execution of a public purpose without compensation.

This Court, conceding that in some of the State Courts it has been held that no recovery can be had "in such cases" for "consequential injury," say, at page 181 (13 Wall.):

"But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that *it remains true* (our italics) *that where real estate is actually invaded* by superinduced additions of water, earth, sand or other material, *or by having any artificial structure placed on it* so as to effectually destroy or injure its usefulness, *is a taking* within the Constitution, and that this proposition is not *in conflict with the weight of judicial authority in this country, and certainly not with sound principle.*"

The conclusion reached in the case by this Court, as to the right to receive compensation where there is consequential dam-

age only or injury which does not amount to an "actual taking," is thus expressed in the concluding paragraph of *Section 510* at *page 545:* (Freund)—

"It is, therefore, not every inconvenience or depreciation of value caused by a public improvement for which the constitutional or statutory provisions in question give a right of compensation but only the impairment of some benefit which is so directly inherent to the property that it can be recognized as part of the legal right or as in the nature of an appurtenant easement the impairment thus constituting a legal injury."

Clearly, this rule, if it means anything, embraces in its scope this case. Is not the right to lay "conduits" through the public street the thing itself—the franchise?

Is not the right to use and enjoy these conduits when lawfully laid, as part of the "plant" necessary to carry out the object for which the franchise is granted, "so directly inherent to the property that it must be recognized as part of the legal right? It is the thing itself: the one single grant—besides the right to exist as a corporation, and if the State has the right to compel the taking up and relaying of mains—except by the exercise of the power of Eminent Domain for compensation,—for any purpose,—she can do indirectly what she is not permitted to do directly,—destroy the corporate business and property, by taking back the thing which she had granted and without which the operation of the business is impossible. This would lead to a conclusion repugnant to law and justice and therefore theoretically impossible.

This Honorable Court has more recently had occasion to deal with this question, especially in *Cotting vs. Kansas City, 183 U. S., pp. 105-106,* and in *United States vs. Lynah,* 188 U. S. 469.

In these cases the principle laid down in *Tumpelley vs. Greenbay,* 13 Wall., and *Taylor vs. Chicago,* 125 U. S., etc., were reaffirmed.

In *Cotting vs. Kansas City,* the Court quoted approvingly from *Barbier vs. Connolly,* 113 U. S.:

"The Fourteenth Amendment in declaring that no State

'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property."

And in *United States vs. Lynah*, 188 U. S., pages 469-470, it was said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

If the great principles here laid down do not extend to the protection of the New Orleans Gas Light Co. in the use and enjoyment of property lawfully constructed for the public service under a contract grant from the State—she will accept her defeat humbly and reverently—but not without a sense of mortification and shame that such things can be in this land of liberty and justice.

The justice of the thing appeals to the common sense of

right at first sight: it needs but to be stated to be "embraced,"—and then a sophistical scheme of State policy sown in selfishness and nursed in pride lifts up the cold hand of power and crushes the weak appeal of private justice in the desecrated name of the public welfare! So the Supreme Court of Louisiana—even as the defendant had done, when for a time it "compensated" voluntarily the damage which it inflicted,—at first impression recognized that it was lawful and just to do so;—and then yielded its better judgment to the suggestion that the "sovereign" reserved the right to do this thing at his own will and the "subject" has no option but to submit.

Even as Xenophon wondered by what arguments the Athenians persuaded themselves that Socrates had merited death, we wonder by what logic the Court allowed itself to be persuaded that its first conclusions were erroneous: and this, in conclusion, leads to an examination briefly of the final decree of the Court to which the writ of error is taken and the authorities submitted by counsel for defendant which presumably induced the change.

The "Opinion" on the Rehearing;—and the authorities for defendant, anticipated.

Not to go into too lengthy detail, when the Supreme Court of Louisiana rendered its final decree it accepted unqualifiedly the proposition that there was nothing in this case except a question of "regulation" of a public highway. It seems to have accepted the proposition submitted by counsel for defendant that the Gas Company had only "a right of user in the public street along with all other citizens" and that it took this right subject to the police power under which the State "for the public health or the public safety might cause all other structures to be placed in or on such streets" * * * and the consequent injury would be *damnum absque injuria.*

It is hoped that the argument which has been presented answers these conditions and exposes their fallacy.

The object, now, is to submit briefly by way of anticipation a review of the authorities cited by the defendant and accepted by the Court.

At page 107, P. R., the Supreme Court states the authorities which seem to have determined its judgment.

The *Mugler* case, 123 U. S., is cited: it is hardly necessary to say that it has no application. Next, *Mr. Justice Brewers'* decision in *Waterworks vs. Kansas, 28 Fed. Rep. 921.* We have already shown that in that case the company had a mere license revocable at will and the city had reserved to itself the right to designate *where* pipes must be laid.

Cincinnati vs. Penny, 21 Ohio State, is in direct conflict with *Tumpelly vs. Greenbay, Taylor vs. Chicago* and *United States vs. Lynah,* etc., if it decides anything at all: the concluding paragraph strips the decision of all force as an *authority* because the judgment after all is placed on the ground that complainant acquired and owned his property with full knowledge, etc. It was a case of "*volenti non fit injuria.*"

In *Columbus Gas Co. vs. Columbus,* plaintiff had not pleaded the constitutional provision against impairment of contract obligation.

Clapp vs. Spokane, 53 Fed. 516, is a manifest "slip.". Court and counsel evidently overlooked that on a *rehearing* the judgment which is cited was reversed and the final decision makes a direct authority in favor of plaintiff. An injunction at first instance refused was granted because the Court found that the City of Spokane *was financially embarrassed and could not be made to respond to a money judgment for damages.*

State vs. Flower, 49 An. 1199 (La.), has no application whatsoever.

In regard to the other cases cited—in the opinion and in defendant's brief it seems sufficient to say that every one relates to the *surface use of the street as a public highway.* This should be sufficient to differentiate them from the present case. There

is no question of *regulation* of the highway as such involved in this case.

The cases nearest in point are those in which it has been held that where a water or gas company is compelled to change the position of its pipes made necessary by a change of grade in the street, it must do so at its own expense: but in these cases the public work with which the companies came in conflict was prosecuted under the power of regulation and maintenance of streets and public highways as such and the interference was local and limited in extent. There is an obvious and wide difference between "grading a street"—maintaining a highway for public use as such, and establishing throughout the area of the city a system of drainage or sewerage coming in conflict, throughout this area, with mains previously laid under legislative grant, and used for a public purpose of equal necessity or benefit—in comtemplation of law,—as the object for which the new work is intended. It may seem a begging of the question, but an illustration sometimes helps an argument, to say that as the State granted a franchise to one company to establish and operate a gas-plant in the streets of the city, it might instead of constructing a drainage and sewerage work itself have created a private corporation and invested it with the franchise of doing it. Could it be contended that such a corporation would have the right to demand that the mains and conduits of the Gas Company should be put out its way if it so happened that the two things came into conflict?

In their application for "rehearing" counsel for defendant laid special emphasis on the case of *Chicago R. R. vs. Chicago*, 166 U. S. 226.

This case, like the others referred to, deals entirely with the question of "regulation" of the surface use,—the public use of of the street as a street for traffic and travel. The general and primary use of the street must always be preserved. The right of "regulation" in this regard is absolute and persons or corpora-

tions who may have been granted certain privileges upon the streets, as such, must conform to any reasonable regulation even if to do so involves pecuniary expense. This was the issue in that case. 166 U. S.

The question was the right of the city to "lay out" a street across its railway tracks and compel the railroad company to erect gates, place flagmen, etc., at its own expense. This Court held that that was mere "regulation" for safe operation of the road over the public street, "in the maintenance of a public highway" (see syllabus, page 227), that to compel the railroad company to bear the expense was *not a taking or deprivation of property without due proceess of law in violation of the Fourteenth Amendment* but an ordinary expense resulting from the lawful exercise of the power of "regulation."

To emphasize the limitation of the point decided in the case the Court, at page 251 (166 U. S.), gives expression to the following significant reservation:

"If, prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing, *buildings to be used in its business it would have been necessary for the jury, in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings.* But no such case is before us; the case is *simply one of the opening of street across land without any buildings upon it and used only for railroad tracks.*"

In this case, as in all others involving the same or similar issue, we constantly meet, as a fundamental premise, that persons taking rights *upon* the street must be considered to do so with knowledge of, and acquiescence in, the reserved and "inalienable" power of regulation. The right of the governing power to "regulate" the use of streets as such; to impose conditions on private and public traffic for safety, expedition and convenience, is elemental.

Every one know this and expects it. But can it with the same reason be said that when a gas company or waterworks company acquires a franchise to lay mains and pipes, in the

public domain,—under the streets,—that, notwithstanding the specific grant to an exclusive right to do this,—which in no manner conflicts with the use of the street as a public highway—it has no safer title than if its mains, if such a thing were possible, were laid upon the surface of the street?

The difference in the condition is too obvious for discussion.

In further anticipation of defendants' contention it need only be added that the attempt to bring this case within the principle of *Bass vs. State, 34 Ann. 494 (La.); Rush vs. City of New Orleans, 43, 275 (La.); and Eldridge vs. Trezevant, 160 U. S. 452*, must fail.

The decisions in those cases rested on the prior existence of a "servitude or easement" in favor of the public, on riparian lands—as expressed in the *syllabus* in 160 U. S., p. 452:

"The provisions of the Fourteenth Amendment to the Constitution do not override public rights, existing in the form of servitudes or easements which are held by the courts of the State to be valid under the Constitution and laws."

CONCLUSION.

A few general observations pertinent to the case are respectfully submitted.

It must be remembered that the "Drainage Commission" is given the right to expropriate property: this implies that the Legislature anticipated just such conditions as have arisen: but whether that be so, in the amount of funds placed at the disposal of the "Commission" the possibility of being compeled to expropriate something is provided for.

The attention of the Court is respectfully called to the fact shown in the Record that for the franchise enjoyed by the plaintiff company a constant and very considerable consideration is being paid to the State in furnishing gas free of cost to the Charity Hospital of New Orleans. This obligation was imposed by an act of 1845, amending the original charter of 1835, and has ever been faithfully complied with.

A statement is in the *P. R., page 90*, showing the gas consumed in the *Charity Hospital* from 1894 to 1900, both inclusive. If charged at rates paid by regular consumers this would amount to $38,481.75, the first year's consumption being $3,721.00 and last $6,921.75.

The increase is accounted for by the extensions and additions to the buildings of the hospital. At the minimum rate for prior years and the maximum until the charter expires in 1925, adding the $38,481.25, we reach in round figures the sum of $412,000.00.

The company accepted its charter in 1835, when the city limits were less than one-half of what they are now and its population probably not exceeding fifty thousand. The undertaking of a public work of this character under relatively primitive conditions, where profitable returns are merely a hope of the future,—have been held in themselves sufficient consideration,—not only for valuable franchise, but even for grants of exemption from taxation.

So, now, for sixty years, this company has faithfully performed its duties, extended its works and laid mains, pipes and conduits, without complaint or objection from private or public authorities, in the enjoyment of its franchises, safe in the confidence that its property could not be disturbed or taken away.

Reason, equity and justice, all alike and with equal force, stand on the side of the claimant: can the law be impervious to their combined appeal and permit under its sanction the consummation of a manifest wrong? But the law will not lend itself to such desecration. It has spoken through this Court, and through wise and great expounders throughout the land. Minds imbued with the majesty of their exalted tasks have set the limits within which States can with propriety inflict injury because of the greater good to come; but the injury can be inflicted only on those or such as have voluntarily placed themselves in a position taking the risk either by pursuing a business or occupation in its nature subject to restraint or prohibition, or

using property unlawfully or in a manner and for purposes offensive to health, morals or the good order of society;—or, by accepting privileges, in terms subject to rescission or repeal.

But the principle under which injury may be inflicted in this class of conditions has never been extended to conditions where contract rights are violated or property is taken or damaged for a public purpose which has been lawfully acquired and is used in the pursuit of a lawful private business or for a public purpose explicitly authorized by the sovereign power of the State.

Such is our case: the sovereign himself cannot take back what he has granted in the form of a solemn contract except by the exercise of the power of "Eminent Domain"—for just and adequate compensation.

The Constitution of the United States prohibits this and this Honorable Court has consistently enforced the prohibition.

The company-plaintiff is here invoking the protection of this great principle and prays for relief accordingly.

Very respectfully submitted,

CHAS. F. BUCK,

For Plaintiff in Error.